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90-1061

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL UNION NO. 501 OF
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

vs.

WESTCHESTER-FAIRFIELD CHAPTER OF
NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC. and
TED KOZERA, MIKE HANLEY, CHRIS KULERS,
MICHAEL CINELLI, FRANK HONAN and
JAMES STEMMERMAN,

Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Do all the members of an unincorporated association have the capacity to sue their own association for compensatory damages on the basis of an action brought on their behalf by six members, and does such an attempt produce a case or controversy, when:

(a) all the assets of their association consist of their own contributions and the investment income thereon;

(b) the unincorporated association is a local labor union which reposes ultimate power and authority in its members who meet once each month, who elect their officers, who have a procedure for removal of their officers from office, and who have elected an executive board to act for them on

matters which arise between membership meetings and cannot await the next such meeting;

(c) no member has ever moved at a membership meeting, or elsewhere, to have the union distribute money from the union treasury to themselves, nor has any member, including the plaintiff-members, otherwise initiated, no less exhausted, any internal procedure to require the union so to act;

(d) The alleged damage is the result of unauthorized acts by two elected officers contrary to the basic policy of the union, contrary to the specific directions of the union's executive board expressed between membership meetings, and not foreseeable by the executive

board; and

(e) Subsequent to the conduct complained of, and with full knowledge of that conduct, the membership, in a contested election, elected the same two officers to continue in their offices?

2. If the assent to a collective-bargaining agreement was induced by the duress of a third person, not a party to the contract, is the collective-bargaining agreement voidable by the victim if the other party to the contract knew of the duress prior to the signing?

3. Assuming solely arguendo that an unincorporated association labor union may be liable in compensatory damages to all of its members, is a labor union, as an entity, liable for a

breach of its duty of fair representation based solely on the unauthorized and unratified conduct of two of its officers, which conduct is contrary to the stated policy of the union and to the exprfessed preference of the union's executive board?

Parties to the Proceedings Below

The plaintiffs in the District Court, Ted Kozera, Mike Hanley, Chris Kulers, Michael Cinelli, Frank Honan and James Stemmerman, sued individually and on behalf of the class of all the members of Local 501. They have petitioned for a writ of certiorari.

Defendants were the Westchester-Fairfield Chapter of National Electrical Contractors Association, Inc., ("Chapter") and Local Union No. 501 of the International Brotherhood of Electrical Workers, AFL-CIO, the cross-petitioner here.

Chapter is a corporation organized in the State of New York. Local 501 is an unincorporated association and a labor organization. It was sued both in its own name and by its president and treasurer, Donald Werle and Douglas

Reid, respectively, who were sued in their representative capacities.

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Petitioner,

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WESTCHESTER-FAIRFIELD CHAPTER OF
NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC. and TED KOZERA,
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Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Cross-petitioner, Local Union No. 501 of the International Brotherhood of Electrical Workers, AFL-CIO ("Local 501" or "Union") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on July 13, 1990.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit of July 13, 1990, reported at 909 F.2d 48, was reprinted in the Appendix to plaintiffs' petition for a writ of certiorari at pp. 1a-17a.[1/] The District Court's order of February 17, 1988 which is unreported, was reprinted at pp. 18a-20a; its opinion of September 26, 1989, reported at 714 F. Supp. 644, was reprinted at pp. 21a-49a; and its final judgment of September 26, 1989, which is unreported, is reprinted at pp. 50a-56a. The order of the Court of Appeals of August 17, 1990, denying a motion for rehearing, which is unreported, was reprinted in the Appendix at pp. 57a-58a.

1/ All Appendix page references are to the Appendix to the petition for a writ of certiorari in Supreme Court Index No. 90-770.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 13, 1990. A timely petition for rehearing was denied on August 17, 1990. The petition of the plaintiffs below for a writ of certiorari in No. 90-770 was served on the cross-petitioners herein on November 15, 1990.

Statement of the Case

On June 4, 1987 Local 501 received a copy of two collective bargaining agreements determined by an arbitration panel (hereinafter the Residential Agreements) together with an arbitration award directing that they be signed by Local 501. On June 22, 1987 Local 501's executive board expressed a preference for taking legal action to

vacate the arbitration award, did not authorize the signing or transmittal of the Residential Agreements to the IBEW, thereafter expected the award to be challenged in court, and had no knowledge, nor reason to know, that its expectations and expressed preference were to be flouted.

Two officers of Local 501 did sign the Residential Agreements and one officer transmitted them to the IBEW.

In a sequence of facts to be detailed below plaintiffs herein sued, individually and as representatives of all members of Local 501, to vacate the arbitration award to nullify the Residential Agreements ordered therein, and for compensatory damages both against the Chapter and, for breach of its duty to provide fair representation, against Local 501.

The arbitration award was thereafter vacated, the District Court finding and holding that the determination and imposition of the Residential Agreements was in excess of the power of the arbitrators because the language of the arbitration agreement clearly disabled the Chapter from unilaterally submitting interest issues to arbitration. The Court of Appeals affirmed the vacation of the award but, reversing the District Court, held Local 501 bound to the Residential Agreements because of the apparent authority of its officers.

The Court of Appeals also reversed the District Court's holding that the conduct of the said two officers could not be imputed to Local 501 for purposes of holding that it, as an entity, had breached its duty of fair representation. It remanded that part of the case

for factual amplification on the issues of whether the actions of the two officers violated Local 501's duty of fair representation and whether Local 501 had in place adequate procedures to guard against the commission of unauthorized acts.

Local 501 is an unincorporated association. It is established by the joint action of ten or more individuals. It is dissolved when fewer than five members in good standing object to dissolution.

The sole income of Local 501 is from membership initiation fees, membership dues and assessments, contributions from working employees for administrative purposes, and income from the investment of the above.

Local Union No. 501 is organized to be run by its members. The

International Brotherhood of Electrical Workers' (IBEW) constitution places great emphasis on Local union membership meetings and provides that "any action that the L. U. can take, and which should be taken prior to the next regular meeting of the L.U." may be taken by Local 501's executive board.

Neither the plaintiffs nor any other member of Local 501 made any motion at any membership meeting or elsewhere for Local 501 to levy against its own treasury to pay compensatory damages to themselves.

The plaintiffs did seek to influence Local 501 action by way of a petition. The petition was accompanied by a letter asking that it "be read ... and ... be duly recorded in the minutes of the regular monthly meeting of L.U. 501 IBEW held this Thursday, July 16,

1987." The petition and accompanying letter were read to the membership at the July 16, 1987 meeting and recorded in the minutes.

The lead plaintiff in this case, who was also the first signatory on the petition and the suthor of the letter which accompanied the petition, received a written reply dated July 21, 1987 from Local 501 to his letter and petition, both dated July 16, 1987, advising him, inter alia, that the matter raised by his petition was open for possible further action by Local 501.

Each plaintiff, and all the other members of Local 501, were sent a letter dated July 22, 1987 together with an enclosed ballot card with instructions to "make sure it is received back at the Local 501 building by or before 5:00 P.M. on August 3, 1987 if you want it to

be considered."

Seven hundred and one ballots were returned by the voting deadline and were counted on the evening of August 3, 1987: 571 to vacate the arbitration award (the action sought in the petition sponsored by the plaintiffs), 105 not to vacate the arbitration award, 19 blanks, and 6 improperly marked.

The plaintiffs, however, did not wait for the balloting period to run its short course. The plaintiffs, having knowledge that Local 501 was responding to their petition, rushed into court. The deadline for balloting was Monday, August 3, 1987. The plaintiffs filed their complaint in this action on the previous Friday, July 31, 1987.

Local 501 plead the failure to exhaust internal union remedies.

Local 501 cross-claimed against the

Chapter and, among other relief, sought nullification of the arbitration determined Residential Agreements on the basis of duress.

The District Court held, on the basis of law, that no duress was chargeable to the Chapter, but it granted to Local 501 on other grounds all the relief sought by it including nullification of the said Residential Agreements. There was no part of the judgment from which Local 501 could have appealed, and the absence of factual findings on the subject of duress rendered that ground unavailable as a basis for affirmance of the District Court's judgment by the Court of Appeals. The subject, therefore, was not raised on the Chapter's appeal to the Court of Appeals. This Court

should, in the interests of justice and because of the importance of the issue in the development of labor law by federal court decisions, correct the errors of law and remand for the finding of facts on the issue of duress and for further legal determinations based thereon.

In brief, Local 501 alleged illegal conduct by the IBEW which had already caused great damage to Local 501, the threatening by the IBEW of further drastic damage to it, and the use by the IBEW "as an excuse for its action the absence of an IBEW approved collective bargaining agreement covering the affected members of Local 501."

Local 501 further alleged "against the foregoing background" that the Chapter "refused to sign the 1986-1989 Inside Wiremen's Agreement ... unless

and until Local 501 would sign the said [Residential Agreements]."

The District Court repeatedly stated during the trial that Local 501 had proved that its officers and executive board members had "an objective basis for their fears about the international."; and continued "So, therefore, I will be constrained to find on the proof I have that there was an objective basis for your clients' concern. You can't lose on that factual issue ..." (i.e. IBEW duress).

The evidence further showed that the Chapter president knew of the IBEW's depredations of Local 501, and of Local 501's fear of the IBEW, and of the use by the IBEW of the absence of a signed, IBEW approved, collective-bargaining agreement as an excuse to reduce Local 501's jurisdiction. The evidence

further showed that the Chapter president had this knowledge prior to the time he threatened to refuse to sign the 1986-1989 Inside Wiremen's Agreement unless Local 501's officers signed the Residential Agreements. The Chapter's failure to sign the Inside Wiremen's Agreement would have left Local 501 with no IBEW approved collective bargaining agreement.

The evidence shows that Local 501's business manager signed the Residential Agreements because of the Chapter's threat to refuse to sign the Inside Wiremen's Agreement and his fear of IBEW action against Local 501 if that agreement were not signed and submitted to the IBEW.

Findings on the foregoing factual matters were not included in the District Court's opinion because it

held, as a matter of law, that no duress was chargeable to the Chapter.

Reasons For Granting The Writ

I. To Determine A Novel, Yet Fundamental, Question Of Federal Labor Law

The relationship of the members of a labor union to the union itself as a separate entity is a recurring subject which has required repeated visitation by this Court.[2/] The question

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2/ E.g., Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) (individual members are not subject to levy to pay damages for union wrongs even when they participate in the wrongs.); United Steelworkers of America v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) (declined to treat union as if it were a corporation for diversity purposes, recognizing problems from such treatment.) (382 U.S. at 152) The geographic jurisdiction of Local 501, for example, encompasses parts of the States of New York and Connecticut.); Complete Auto Transit, Inc. v. Reis, 451 U.S. 401 (1981) (individual members not liable even when participating in an unauthorized strike for which the union has no liability).

presented in this case is whether all the members of Local 501 can sue themselves (as Local 501 is an unincorporated association) for monetary damages and whether such an attempt creates a case or controversy. Otherwise put, the question is whether Local 501 is an entity separate from all of its members for the purpose of being sued by them all for the payment to them of their own meney from its treasury. The District Court termed this "a novel question" and dismissed the complaint. (55a) The Court of Appeals reversed the dismissal and remanded that part of the plaintiffs' case against Local 501 (17a) without even alluding to the existence of this question. (The State of Colorado's attempt to require the incorporation of all labor unions doing business within the state may have

resolved this problem, but the legislation was held to violate the federal constitution in American Federation of Labor v. Reilly, 113 Colo. 90 (1944)).

It is peculiarly the province of this Court to address seminal matters of labor law, such as a union member's relationship to his union, on a case by case basis, because it is an essential part of our Nation's labor law, arises in the instant case within the context of 29 U.S.C. section 185 (Labor-Management Relations Act, section 301, 61 Stat. 156 (1947)), and involves the subject of a union's court-law created duty of fair representation.

This Court held in Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) "that the substantive law to apply in suits under

section 301(a) is federal law ... " 353 U.S. at 456. The Court then wrote:

> "The Labor-Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of political inventiveness will be determined by the nature of the problem."

353 U.S. at 457.

Although State courts have concurrent jurisdiction of section 301 suits, Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962), State courts must apply federal law and "incompatible doctrines of local law must give way to principles of federal labor law." Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 102 (1962).

The need to use federal law applies with special force to duty of fair representation issues which arise in connection with and out of section 301, as does the instant case, as the concept of a union's duty of fair representation is itself a creature of court determined federal labor law. See Steele v. Louisville N. R. Co.. 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Ford Motor Company v. Huffman, 345 U.S. 330 (1953); Humphrey v. Moore, 375 U.S. 335 (1964); and Vaca v. Sipes, 386 U.S. 171 (1967).

Moreover, the question of whether every member of an unincorporated association may bring an action for money damages against his own unincorporated association touches on Rules 17(b) and 23.2 of the Federal

Rules of Civil Procedure.

Albeit the question is novel in the sense that no prior decision has been found which addresses it, the question does not exist in a vacuum.

It is Hornbook law that each member of Local 501 in good standing has an undivided ownership interest as a joint tenant in the property of his unincorporated association, its treasury and all other assets, 6 New York Jurisprudence 2d on Associations and Clubs, section 13, at 342 (1980 Ed.), "and they, accordingly, have the right to manage, control, and dispose of such property or funds at their joint pleasure." 7 Corpus Juris Secundum on Associations, Section 26, at 70 (1980 Ed.).

The plaintiffs have not cited any authority, and counsel for Local 501 has

found none, to support the proposition that the entire membership of an unincorporated association union can successfully sue its union for compensatory damages.[3/]

The acceptance of the plaintiffs' proposition, and a subsequent legal victory by them, could result in the dissolution of the members' own Union treasury through its distribution to themselves, and could possibly result in the dismantling of the Union itself through the forced sale of real property, if any, and chattels. The members might then need to vote a special assessment on themselves to replenish their own Local 501 treasury.

3/ The cases cited by plaintiffs are: Trail v. Int'l Bhd. of Teamsters, 542 F. 2d 961, 964 (6th Cir. 1976) ("'over-the-road' truckdrivers who live in Michigan

The acceptance of the plaintiffs' proposition, and a subsequent legal victory by them, could result in the dissolution of the members' own Union treasury, through its distribution to themselves, and could possibly result in the dismantling of the Union itself through the forced sale of real property, if any, and chattels.

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and who are employed by various Michigan trucking companies, ..."); Frenza v. Sheet Metal Workers, 567 F. Supp. 580, 582 (E. D. Mich. 1983) ("Plaintiffs, thirteen members of Local 80, ...") (no class action); Warner v. McLean Trucking Co., 627 F. Supp. 203, 205 (S. D. Ohio 1985) ("members of Local 100, International Brotherhood of Teamsters (IBT), and who are employed by McLean Trucking Company's breakbulk facility in Cincinnati, Ohio."); Sako v. Teamsters Local 705, 125 LRRM 2372, 2373 (N. D. Ill. 1987) ("all members of the union who are also employed by Niedert."); Warehouse Union, Local 860 v. NLRB, 652 F. 2d 1022, 1023 (D.C. Cir. 1981) (a unit of thirteen clerical workers employed by "Emporium"); Renninger v. Teamsters, Local Union 429, 133 LRRM 2085 (E.D. Pa. 1989) (five individual plaintiffs; no class action)

The members might then need to vote a special assessment on themselves to replenish their own Local 501 treasury. And, if Local 501's assets were insufficient to satisfy the compensatory damages, members of Local 501, as individuals, might then bring an action against themselves, as individuals, to satisfy the judgment. Consolidated Laws of New York, General Associations Law, Section 16(1).[4/]

None of the federal labor or procedural statutes determines the

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4/ The Federal courts ordinarily apply the law of the State with respect to such questions: Rosen v. Allegheny Corporation, 133 F. Supp. 858, 867 (S.D.N.Y. 1955); see Petrol Shipping Corporation v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103, 107-108 (2d Cir. 1960), cert. denied 385 U.S. 931 (1966); but in this case it would be necessary to decide whether the federal law limiting a money judgment against a labor organization to its own assets as an entity (29 U.S.C. section 185 (b)) should be applied when the judgment creditors are the entire membership of the union.

question presented in this case. The issue falls within the penumbra and calls for judicial inventiveness. The subject deserves this Court's attention.

II. To Establish Criteria For Determining The Proper Course Of Judicial Intervention Or Judicial Abstention Especially In Cases Where The Class Represents A Majority Of The Union Membership

Labor unions are, among other things, political entities and in regard to this characteristic the law has established an internal tension which the courts must try to accomodate. The law seeks to promote internal union democracy and direct membership political participation both by judicial intervention (e.g. 29 U.S.C. sections 412, 464, and 482(b), American Federation of Musicians v. Wittstein, 379 U.S. 171, 182-183 (1964) ("The pervading premise of both these titles is that there should be full and active

participation by the rank and file in the affairs of the union."); Navarro v. Gannon, 385 F. 2d 512 (2d Cir. 1967)) and by judicial abstention (International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers v. Hardeman, 401 U.S. 233 (1971), reh. denied 402 U.S. 967 (1971) (recognizing "the apparent congressional intent to allow unions to govern their own affairs, ..." 401 U.S. at 246); Howard v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local 131, 560 F. 2d 17, 21 (1st Cir. 1977); Williams v. International Typographical Union, 423 F.2d 1295 (10th Cir. 1970), cert. denied 400 U.S. 824 (1970); Gurton v. Arons 339 F.2d 371, 375 (2d Cir. 1964) ("General supervision of unions by the courts

would not contribute to the betterment of unions or their members or to the cause of labor-management relations.").

Thus, it does not appear that it serves the purpose of the law for the judiciary to become involved in what all the members of Local 501, for that is the definition of the class on whose behalf the plaintiffs allege they are suing, can do for themselves directly. No Local 501 member (including, of course, no plaintiff) has sought to accomplish directly by a vote of the membership what plaintiffs ask of the courts.

Whether all the members of Local 501 should seek relief from their own Union treasury for themselves is essentially a political question. It can be decided by membership vote.

This case gives this Court the

opportunity to delineate criteria to determine when court intervention is called for by the federal law and when the judiciary should abstain from interference in internal union politics. The exercise of such leadership by the Court in this area would be of value for, although the instance of all the members of an unincorporated association suing their association to pay themselves from their own treasury is novel, the prospect of classes composed of a majority of the members of a union is not.

It is suggested that, absent evidence that democratic procedures are unavailable and attempts at membership participation would be futile (there is no such evidence in the instant case and Local 501 plead the affirmative defense of failure to exhaust internal union remedies), the substitution of the

judicial forum for the political forum is counterproductive to the expressed Congressional intent to foster union democracy.

The question of whether the union members' money which is in the Union treasury should be paid out to the union members ought to be decided by those members, not by a court.

III. To Give Guidance To The Courts Concerning The Legal Consequences Of The Use Of Third Person Duress By A Party Negotiating A Collective Bargaining Agreement

The Congress found "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct ... " 29 U.S.C. section 401(b) (Labor-

Management Reporting and Disclosure Act, as amended, section 2, 73 Stat. 519 (1959))

In this case Local 501's officer signed the Residential Agreements because of duress from Local 501's affiliated international union, the IBEW, not a party to the contracts. The signing took place subsequent to the time when the Chapter, the employer party to the agreements, knew of the duress and used it. Moreover, the Residential Agreements themselves resulted from a unilateral submission by the Chapter to a panel of arbitrators in violation of the agreement to arbitrate which clearly required mutual submission of interest arbitration issues.

It is respectfully submitted that the interests of justice require the correction of the errors below and a statement by this Court of the law as it

applies to such duress in the collective bargaining process.

The first of the two misstatements of the law of duress in this case is:

> "Duress is a basis to invalidate a contract only when the duress is exercised by the other contracting party, not some third party. See Citibank v. Graphic Scanning Corp., 459 F. Supp. 337 (S.D.N.Y. 1978); Weinraub v. Int'l Banknote Co., 422 F. Supp 856 (S.D.N.Y. 1976) (47a-48a)

The cited cases, discussed below, do not support the proposition for which they were adduced.

Restatement (Second), Contracts, Section 175(2) reads:

> "If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction."

The Restatement, supra, includes the following exposition:

> "Duress by a third person. If

a party's assent has been induced by the duress of a third person, rather than that of the other party to the contract, the contract is nevertheless voidable by the victim. There is, however, an important exception if the other party has, in good faith and without reason to know of the duress, given value or changed his position materially in reliance on the transaction." (Comment (e) to Section 175)

In this case the Chapter did know of the IBEW's duress and, moreover, the Chapter was not "in good faith" because it unilaterally asked the arbitration panel to impose collective-bargaining agreements on Local 501 when such a subject matter could be submitted for arbitration under the arbitration agreement "by mutual agreement only".

The District Court, in support of its erroneous statement on duress by a third party, cited Citibank, supra, and Weinraub, supra.

Citibank did not rule on the issue of duress. The determination was made on the basis of collateral estoppel.

459 F. Supp. at 341 Not only did the decision rely on collateral estoppel, but the court could not have considered or determined the issue of third party duress because there was no third party in that case. 459 F. Supp. at p. 341, ftnt. 3. There is dictum in Citibank on third party curess and in support of that dictum the case of W. R. Grimshaw Co. v. Neil C. Withrow Co., 248 F. 2d 896, 905 (8th Cir. 1957) is cited.

Grimshaw, however, followed the law as written in section 175 (2) of the Restatement (Second), Contracts and, thus, is no support for the misstatement of the law of duress in the instant case.

Weinraub, like Citibank, does not support the proposition for which the District Court cited it. Weinraub, too, followed the statement of the law as set

forth in section 175 of the Restatement (Second), Contracts. In Weinraub the defendants moved for summary judgment on the ground that "any economic duress was imposed by First Jersey National Bank, not by defendants." 422 F. Supp. at 860. The court rejected that argument, called it "somewhat simplistic" (422 F. Supp. at 860), looked behind the third party aspect, found the defendants "were aware" of the duress imposed by a third party on the plaintiffs (422 F. Supp at 860), and might share some responsibility for creating the situation in which the plaintiffs found themselves (422 F. Supp. at 860); as does the Chapter in this case by unilaterally asking the arbitration panel to impose the Residential Agreements on Local 501.

The defendants' motion for summary judgment in Weinraub, based on the

argument that they had no liability because the duress was imposed by a third party, was denied.

The District Court further misstated the law of duress in the instant case when it wrote: "A negotiating demand by an adverse party cannot be a sufficient predicate for a claim of duress, since that type of pressure is at the heart of virtually every contractual negotiation." (48a)

The District Court then cited: "Cf. Weinraub, supra, 422 F. Supp. at 859; Restatement (Second) of Contracts, section 492 (wrongful threat is required)." (48a)

Weinraub, contrary to that for which it was cited, holds that a negotiating demand by an adverse party can be a sufficient predicate for a claim of duress. 422 F. Supp. at 860

And the Restatement (Second), Contracts also states the law differently from the District Court's citation of it. The District Court cited "Restatement (Second) of Contracts, section 492 (wrongful threat is required." (48a) But there is no section 492 in the Restatement (Second), Contracts. The subject of former Section 492, according to Table VI of the Restatement (Second) of Contracts, is now found in its sections 174 and 175. We have already examined Section 175. Section 174 is concerned only with physical compulsion.

As is seen in Weinraub, supra, a negotiating demand, even when the thing demanded is not illegal, can be a sufficient predicate for a claim of duress. Weinraub is not a sport. Jamestown Farmers Elevator, Inc. v.

General Mills, Inc., 552 F. 2d 1285 (8th Cir. 1977) reh. denied 552 F. 2d 1295; Aircraft Associates & Mfg. Co., Inc. v. United States, 357 F. 2d 373 (Ct. of Claims, 1966).

The Chapter acted in bad faith by unilaterally submitting a dispute where submission by "mutual agreement only" was required. The Chapter then leveraged itself on the IBEW's duress of which it had knowledge.

Local 501 acknowledges that threats are part of the bargaining process but, as the courts hold, certain threats including those not threatening illegal acts, in certain circumstances, are improper and constitute duress. Such threats and such circumstances were present in this case.

The District Court gravely erred on the law of duress. Because of the

importance of the subject of duress in collective bargaining negotiations and in the interests of justice, we ask that the writ of certiorari also issue on this subject.

IV. To Explicate The Place Of The Newly Minted "Meaningful Standards" Test In The Fabric Of The Law

The dissent in American Society of Mechanical Engineers, Inc., v. Hydrolevel Corp., 456 U.S. 556 (1982) (Hydrolevel) reads at 594:

> "How far the Court's holding extends is unclear. The Court emphasized that ASME is a standard setting organization. Yet it does not limit its rationale to these particular organizations. One must be concerned whether the new doctrine and the sweep of the Court's language will be read as exposing the array of nonprofit associations - professional, charitable, educational, and even religious - to a new theory of strict liability in treble damages."

This case is an appropriate vehicle to help clarify "[h]ow far the Court's

holding extends". For the application of the "meaningful standards" test in this case by the Court of Appeals appears to constitute, by extension, the use of that test to reverse prior decisions of this Court.

The Court of Appeals wrote: "Yet we conclude that if the acts of the president and the business manager are found to violate the union's duty of fair representation, such acts should be attributable if it is determined that the Local Union did not have in place adequate procedures to guard against the commission of such unauthorized acts." (17a) The Court of Appeals further wrote: " ... we vacate the district court's finding that the Local Union may not be held liable for any potential breach of the duty of fair representation ..." (17a)

Thus, the Court of Appeals, depending on further facts, would hold Local 501 liable based on the authorized and unratified acts of two of its officers. The case was remanded for "further factual amplification" for "a determination of whether the agents' actions constituted a breach, and whether such breach might have been avoided through institution of proper safeguards." (17a)

We ask this Court to grant certiorari to review the determination of the Court of Appeals on the Union's potential liability because, if not reviewed now, the reversal of the District Court will become the law of the case and because that Court of Appeals' determination, on the facts of this case, fails to follow the decisions of this Court. See National Association for the Advancement of

Colored People v. Claiborne Hardware Co., 458 U.S. 886, 930-931 (1982); Complete Auto Transit v. Reis, 451 U.S. 401, 415-416 (1980); Carbon Fuel Co., v. United Mine Workers of America, 444 U.S. 212, 216 (1979).

The holding that the conduct of Local 501's two officers "cannot be properly imputed to the Union" (45a) was made by the District Court on the basis of findings of fact rooted in the record and supported by references in the opinion to the particular facts of this case. (45a-46a) The Court of Appeals reversed without disputing the District Court's findings of fact, without basing its reversal on any reference to any particular facts which it found, but writing only that "such acts should be attributable if it is determined that the Local Union did not have in place

adequate procedures to guard against the commission of such unauthorized acts." (17a), citing Hydrolevel, supra.

Local 501 does not object to or oppose the application of the "meaningful standards" test enunciated in Hydrolevel, supra, but the Court of Appeals by seeking to apply only that test has jettisoned the bulk of the law of agency relevant to this case. For, by paying no attention to the facts of this case, it has overlooked all the applicable criteria and inquiries which ordinarily precede the application of the "meaningful standards" test. Were the law to be followed as stated by this Court, even if the facts to be determined on remand were found adversely to Local 501, the determination of the District Court should stand.

This Court has closely examined the legislative history of the Taft-Hartley Act with particular reference to union liability and the subject of agency. In reviewing that legislation this Court has written:

> "At the same time, Congress gave careful attention to strikes during the term of a collective-bargaining agreement, but stopped short of imposing liability upon a union for strikes not authorized, participated in, or ratified by it."

Carbon Fuel Co. v. UMW, 444 U.S. at 216

> "The legislative debates and the process of legislative amendment demonstrate that Congress deliberately chose to allow a damages remedy for breach of the no-strike provision of a collective-bargaining agreement only against unions, not individuals, and, as to unions, only when they participated in or authorized the strike." (emphasis in original)

Complete Auto Transit v. Reis, 451 U.S. at 415-416.

NAACP v. Claiborne Hardware, supra,

is a post-Hydrolevel case and actually cites ASME v. Hydrolevel at 458 U.S. 930. Yet, in NAACP v. Claiborne Hardware the Court did not apply the "meaningful standards" test because it never had to reach it. The Court reviewed the facts and found that the statements attributed to an admitted agent of the NAACP were "contrary to NAACP policy" 458 U.S. at 930, that there was no evidence that the NAACP had ratified the violence complained of (458 U.S. at 930-931) or had specific knowledge of any acts of violence or threats (458 U.S. at 931), or had authorized the boycott which had led to threats and violence. (458 U.S. at 931)

It was on the basis of the above criteria applied by this Court (knowledge, authorization and ratification), that the District Court

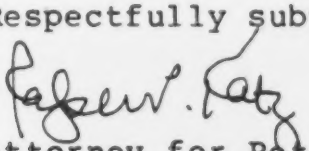
in the instant case held that the conduct of two officers could not be imputed to Local 501. The decision of the Court of Appeals would substitute the "meaningful standards" test in place of the above common law criteria for determining responsibility because of an agency relationship.

The "meaningful standards' test is a new legal development. This Court's explication of its place in the fabric of the law is needed.

CONCLUSION

For all the reasons above stated, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,



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